Supreme Court, U.S.
FILED

971668 JUN 8 1998

OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1997

NICK J. MILETI,

PETITIONER,

v.

MARCIA N. COLE,
REPRESENTATIVE OF THE ESTATE OF
JOSEPH E. COLE,

RESPONDENT.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the judgment of the court of appeals that the Petitioner was subject to personal jurisdiction in the United States District Court for the Northern District of Ohio conflicts with the decisions of this Court regarding whether, consistently with the requirements of due process, a court may exercise personal jurisdiction over a nonresident of the forum state.

II. Whether the judgment of the court of appeals applying the Ohio contract statute of limitations constitutes such a departure from the accepted practice fixed by Ohio law as to necessitate a remand in order to allow application of the proper rule of law.

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CITATION OF REPORTS OF OPINIONS AND ORDERS

The court of appeals' decision in this case is reported at *Cole v. Mileti*, 133 F.3d 433 (6th Cir. 1998). The Memorandum Opinion and Order of the Magistrate Judge for the United States District Court for the Northern District of Ohio, Eastern Division is not reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit of which the Petitioner seeks review was entered on January 8, 1998. This Court has jurisdiction to review on a writ of certiorari the judgment of the court of appeals pursuant to 28 U.S.C.A. § 1254(1) (West 1993).

STATUTORY PROVISIONS INVOLVED

§ 2307.382 Personal jurisdiction.

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state[.]

Ohio Rev. Code Ann. § 2307.382 (Anderson 1995).

§ 2305.06 Contract in writing.

Except as provided in sections 126.301 [126.30.1] and 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

Ohio Rev. Code Ann. § 2305.06 (Anderson 1995).

§ 337. Four years; written contract; exception; book account; account stated based upon account in writing; balance of mutual; open and current account in writing; rescission of written contract

Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as

provided in Section 336a of this code;[1] provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage.

Cal. Civ. Proc. Code § 337 (West 1982).

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[1]Section 336a, referred to in § 337, provides for a six-year period of limitation for actions upon corporate bonds, notes, or indentures.

STATEMENT OF THE CASE

This case involves a dispute under a contract entered into between the Petitioner, Nick J. Mileti, and Joseph E. Cole, the Respondent's deceased husband. In 1983, Mileti co-produced a motion picture called "Streamers" and organized Streamers International Distributors, Inc. (Streamers), a California corporation, to distribute the film. Cole was an initial investor in the corporation. He purchased 200 shares of the corporation's stock and loaned $475,000 to the corporation. Cole also became an officer and a director of Streamers. He borrowed money from the Equitable Bank of Baltimore in order to fund his investment.

The motion picture was unsuccessful and Mileti arranged to purchase Cole's stock in the corporation in exchange for Cole's resignation as an officer and a director. To facilitate this transaction, on September 4, 1984 Cole and the Petitioner entered into the Agreement at issue in this case. Under that contract, Cole conveyed to Mileti all of Cole's stock in the corporation and transferred to Mileti all of Cole's interest in the indebtedness of the corporation. In exchange, Mileti assumed all of Cole's liability to Equitable Bank of Baltimore. The Agreement provided that Mileti would repay Cole's obligations to the Bank not later than June 16, 1985. Pursuant to the Agreement, the parties chose the law of California to govern any disputes that might arise under the contract.

Mileti had moved to California in 1979, before the organization of Streamers International Distributors, Inc., in 1983 and the execution of the September 1984 Agreement. The Petitioner remained a resident of California at all times relevant to the negotiation and execution of the Agreement. Cole was a resident of Ohio when the parties entered into the September 1984 contract. In early 1984, when the motion picture failed at the box office, Mileti began to negotiate with Cole to purchase Cole's ownership interest in the corporation.

It was Cole who sent to Mileti in California a written draft incorporating the parties' agreement. Cole and Mileti and their representatives then exchanged telephone calls between Ohio and California. The negotiations culminated in Mileti's signing of the Agreement in California and sending it to Ohio, where Cole executed it.

Mileti failed to repay Cole's obligations to Equitable Bank of Baltimore by June 16, 1985, as called for by the Agreement. Cole sued the Petitioner for breach of contract on May 24, 1994, nearly nine years after the alleged breach. Cole filed his diversity action in the United States District Court for the Northern District of Ohio.[2] The district court had subject-matter jurisdiction over Cole's action by virtue of 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 1998). Mileti was served with process in California pursuant to the Ohio long-arm statute. After denying Mileti's motion to dismiss for lack of personal jurisdiction, the United States Magistrate granted summary judgment to the Respondent, concluding that the district court had personal jurisdiction over the Petitioner and that Ohio's 15-year statute of limitations, rather than California's four-year statute, applied so as to render the action timely.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the magistrate, ruling that the district court possessed personal jurisdiction over Mileti and that the action was governed by Ohio's 15-year statute of limitations. In so holding, the court of appeals concluded that Mileti's act of "negotiating and executing a contract via telephone calls and letters" to Cole, an Ohio resident, was sufficient to establish that the Petitioner purposefully availed himself of the privilege of conducting business in Ohio by creating a continuing obligation there, such that an exercise of

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[2]Marcia N. Cole was substituted as the plaintiff after Joseph Cole died on January 8, 1995.

personal jurisdiction by Ohio courts comported with the requirements of due process. *Cole*, 133 F.3d at 436. In sustaining the district court's exercise of personal jurisdiction over the Petitioner, the court of appeals, while recognizing that it was also obligated to determine whether the Ohio long-arm statute authorized personal jurisdiction, collapsed that inquiry into the constitutional analysis of the required minimum contacts, never making an independent finding as to whether the exercise of personal jurisdiction satisfied state law in the first instance. *Id.*

With respect to the statute of limitations, the court of appeals decided that the 15-year Ohio statute applied to the action, rather than the California four-year statute. In so holding, the court concluded that Ohio law does not require the application of a shorter statute of limitations of another state in which a cause of action arose. *Id.* at 437. The court of appeals correctly observed that the Ohio legislature repealed the state borrowing statute but ignored its own precedent and that of the Ohio Supreme Court holding that Ohio common law retains a borrowing provision that requires the application of a shorter foreign statute of limitations under the circumstances of the present case. *Id.* As a result, the court of appeals applied an incorrect rule of law and subjected the Petitioner to an action that is time-barred under Ohio law.

ARGUMENT

I. THE JUDGMENT OF THE COURT OF APPEALS THAT THE PETITIONER WAS SUBJECT TO PERSONAL JURISDICTION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT.

In *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), this Court held that, before a court may exercise personal jurisdiction over a nonresident of the forum state consistently with the requirements of the Fourteenth Amendment, the nonresident must have had certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Whether due process of law is satisfied in subjecting a nonresident defendant to personal jurisdiction in a particular forum depends upon the quality and nature of the defendant's activity in the forum in relation to the fair and orderly administration of the laws that it was the purpose of the Due Process Clause to insure. *Id.* at 319. In order for an exercise of personal jurisdiction over a nonresident defendant to meet the requirements of due process, the quality and nature of the defendant's activity in the forum state must be such that it is reasonable and fair to require him to conduct his defense in that state. *Kulko v. Superior Court of California In and For City & County of San Francisco*, 436 U.S. 84 (1978).

To satisfy the minimum contacts test required by the Fourteenth Amendment, a nonresident defendant must purposefully have availed himself of the privilege of conducting business in the forum state, thus invoking the benefits and protections of its laws. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). A nonresident's contacts with

a forum are sufficient to allow an exercise of personal jurisdiction consistent with the Fourteenth Amendment if such contacts create a substantial connection with the forum state. *Id.* at 475. It is the contacts of the nonresident defendant, and not the activities of a resident directed toward the defendant, that are relevant in determining whether a forum's exercise of personal jurisdiction is constitutional. *See id.* The unilateral activity of those who claim some relationship with the nonresident defendant cannot satisfy the requirement of contact with the forum state. *Kulko*, 436 U.S. at 93-94; *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). In judging minimum contacts, a court properly focuses upon the relationship among the defendant, the forum, and the litigation. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984).

If it is determined that a nonresident defendant purposefully established minimum contacts with the forum state, then other factors may be considered to determine whether the assertion of personal jurisdiction is consistent with fair play and substantial justice. *Burger King Corp.*, 471 U.S. 476; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1989). These factors include the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Burger King Corp.*, 471 U.S. at 476-77; *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

In cases where a nonresident's contacts with a forum state involve a contract with a resident of that state, the Court has recognized that an individual's contract with an out-of-state party cannot alone establish sufficient minimum contacts in the other party's home forum. *Burger King Corp.*, 471 U.S. at 478. Rather, it is the parties' negotiations and the contemplated

future consequences in the forum state, along with the terms of the contract and the parties' actual course of dealing, that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum. *Id.* at 479.

In the present case, Mileti's contacts with the State of Ohio were insufficient to allow the district court in Ohio to exercise personal jurisdiction over him consistent with the requirements of the Fourteenth Amendment. The court of appeals found that the Petitioner's sole contact with Ohio was the transaction of business "by negotiating and executing a contract via telephone calls to an Ohio resident." *Cole*, 133 F.3d at 436. Unlike the franchise agreement in *Burger King Corp.* calling for the establishment of "a carefully structured 20-year relationship that envisioned continued and wide-reaching contacts" in the forum state, 471 U.S. at 480, the contract between Mileti and Cole contemplated no continuing relationship between the parties but provided only that Mileti was to pay Cole's obligations to the Equitable Bank of Baltimore. According to the contract, such payments were to be made by Mileti directly to the Bank and were not to involve any transactions between Mileti and Cole. The language of the instrument evidences that the Agreement was to have no contemplated future consequences in Ohio, let alone establishing a relationship envisioning continuing and wide-reaching contacts in that state. *Id.* at 479-80. The facts of this case demonstrate that the court of appeals erroneously held that Mileti's contract with Cole was *alone* a sufficient minimum contact to establish the basis for an exercise of personal jurisdiction over Mileti in Ohio. *Id.* at 478. The holding of the court of appeals was a misstatement of the requirements of the Fourteenth Amendment as set forth by this Court. The judgment of the court of appeals clearly conflicts with the relevant decisions of this Court with respect to what is required by due process in the exercise of personal jurisdiction over a nonresident defendant. If the decision of the court of appeals is not corrected, then, in the Sixth Circuit, nonresident

defendants will hereafter be subject to personal jurisdiction in a foreign state based solely upon their contracts with an individual in the forum state, a result specifically eschewed by the Court. *Id.* An exercise of personal jurisdiction under such circumstances would result in a nonresident's having to defend a claim in a particular forum when the quality and nature of the defendant's activity in the forum state were not such that it is reasonable and fair to require him to conduct his defense there. *Kulko*, 436 U.S. at 92.

Moreover, even if it were concluded that Mileti purposefully established minimum contacts with the State of Ohio, an application of the other factors relevant to the determination of the constitutional permissibility of an exercise of personal jurisdiction over a nonresident defendant results in the conclusion that the Ohio court could not exercise personal jurisdiction over Mileti. *Burger King Corp.*; *World-Wide Volkswagen Corp.* The burden on Mileti of having to litigate in Ohio when the parties' relationship involved only tenuous contacts in that state is similar to that of any nonresident defendant required to defend a claim in an unanticipated forum. Ohio's interest in adjudicating the dispute is no greater than that of any plaintiff's forum state and is less than the usual interest because Ohio cannot apply its own law to the dispute. The parties chose California law to govern disputes arising under the Agreement. The Respondent, as plaintiff, has the usual interest in litigating in her home forum. The record, however, does not demonstrate that the Respondent would suffer any undue inconvenience or a denial of effective relief by having to maintain her action in California, which has personal jurisdiction over the Petitioner. The interest of the judicial system in obtaining the most efficient resolution of controversies is promoted by allowing a California court to apply California law, which was chosen by the parties to govern their contract. It does not appear that the furthering of fundamental social policies favors either Ohio or California as the more appropriate forum for this litigation. The application

of these factors strengthens the conclusion that the district court in Ohio lacked personal jurisdiction over the Petitioner and subjected him to jurisdiction there in clear conflict with the relevant decisions of this Court. *Burger King Corp.*, 471 U.S. at 476-77; *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

It is also noteworthy that the court of appeals employed an incorrect rule of Ohio law in deciding that the Petitioner was subject to personal jurisdiction by a court sitting in Ohio. The court correctly noted that an exercise of personal jurisdiction over a nonresident defendant must both be authorized by the Ohio long-arm statute and meet the constitutional requirements of due process. *Cole*, 133 F.3d at 436. The court then, however, completely ignored the question of whether an exercise of personal jurisdiction over Mileti was authorized by the Ohio long-arm statute, collapsing such an inquiry into the constitutional analysis. *Id.* This was so even though the court of appeals correctly observed that the Ohio Supreme Court in *Goldstein v. Christiansen*, 70 Ohio St. 3d 232, 638 N.E.2d 541 (1994), declared that the Ohio legislature has *not* extended the relevant portion of the long-arm statute to the limits of the Due Process Clause.[3]

Ohio Rev. Code Ann. § 2307.382 provides that a court may exercise personal jurisdiction over a person who acts

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[3]The decision in *Goldstein* nullified the Sixth Circuit's long-standing interpretation of the Ohio long-arm statute as being coextensive with the limits of due process. *See In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972). The present case was not the first, however, in which the court of appeals perpetuated its erroneous interpretation of the long-arm statute in light of *Goldstein*. *See Nationwide Mutual Insurance Co. v. Tryg International Insurance Co.*, 91 F.3d 790 (6th Cir. 1996) (Ohio long-arm statute's reach extends to limits of Due Process Clause).

directly or by an agent as to a cause of action arising from the person's "transacting any business in this state." Ohio courts have held that this clause of the long-arm statute is not satisfied by a nonresident's ordering of goods from an Ohio resident by telephone, even though the goods are specially ordered and must be shipped to the buyer's place of business by the Ohio resident. *See Ohio State Tie & Timber, Inc. v. Paris Lumber Co.*, 8 Ohio App. 3d 236, 456 N.E.2d 1309 (1982). Similarly, when a nonresident defendant has ordered machinery from an Ohio resident and has signed and mailed the order outside of Ohio, and the entire transaction was initiated by the nonresident defendant in its own state, the nonresident defendant has not transacted any business within Ohio so as to be subject to personal jurisdiction pursuant to the long-arm statute. *See NRM Corp. v. Pacific Plastic Pipe Co.*, 36 Ohio App. 2d 179, 304 N.E.2d 248 (1973).

The present case must be remanded to the court of appeals, if for no other reason, to require that court to consider the essential issue of whether the exercise of personal jurisdiction over Mileti was authorized by the Ohio long-arm statute. The record is devoid of any such determination. It is not clear from the record that the facts of the present case would authorize an exercise of personal jurisdiction pursuant to the long-arm statute. Under the present record, half of the analysis required to subject the Petitioner to personal jurisdiction in Ohio is missing. It cannot be concluded that the error by the court of appeals was harmless because, as discussed above, the Ohio Supreme Court has stated that the jurisdictional analysis under the long-arm statute differs from that under the Fourteenth Amendment. The court of appeals' analysis under the Fourteenth Amendment does not suffice, therefore, for the determination required by the Ohio long-arm statute.

II. THE COURT OF APPEALS' APPLICATION OF AN INCORRECT RULE OF LIMITATIONS LAW, THEREBY SUBJECTING THE PETITIONER TO A TIME-BARRED CAUSE OF ACTION, CONSTITUTES SUCH A DEPARTURE FROM THE ACCEPTED PRACTICE FIXED BY OHIO LAW AS TO NECESSITATE A REMAND.

A federal court sitting in diversity must apply the substantive law, including the conflict-of-laws rules, of the state in which it sits. *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). In *Pinney v. Cummings*, 26 Ohio St. 46 (1875), the Ohio Supreme Court adopted a common law borrowing rule to govern conflict-of-laws issues arising with respect to whether the Ohio statute of limitations or the statute of limitations of a foreign state should be applied in a case brought in an Ohio court. The Ohio Supreme Court held in *Pinney* that actions upon causes of action accruing outside of the State of Ohio, and not limited by the law of the place where they accrued, or limited thereby to longer periods than those specified in the Ohio statutes, are governed as to limitation by the Ohio statutes in the same manner as causes of action accruing within Ohio. *Id.*

The United States Court of Appeals for the Sixth Circuit itself interpreted *Pinney* as setting forth the Ohio common law with respect to conflict-of-laws issues regarding limitations. In *Phelps v. McClellan*, 30 F.3d 658 (6th Cir. 1994), the court of appeals cited *Pinney* for the principle that, under Ohio common law, Ohio's statute of limitations is applied only if the relevant limitation period under the law of the state where the cause of action accrued is longer than Ohio's. *Id.* at 661. If the limitation period of the state where the cause of action accrued is shorter, then Ohio applies the foreign statute of limitations. *Id.* The United States Court of Appeals

for the Sixth Circuit also recognized *Pinney* as establishing the common law rule in Ohio in *Myers v. Alvey-Ferguson Co.*, 331 F.2d 223 (6th Cir. 1964), in which the court, without reference to any Ohio statute, adopted the holding of *Pinney* as controlling conflict-of-laws issues pertaining to the application of foreign statutes of limitations.

Ohio had also provided legislatively for the borrowing of a shorter foreign statute of limitations. Ohio Rev. Code Ann. § 2305.20, until its repeal in 1965, provided that if the laws of any state or country where a cause of action arose limited the time for commencement of the action to a lesser number of years than did the statutes of Ohio for like causes of action, then a cause of action would be barred in Ohio after the expiration of the lesser number of years. *See Cope v. Anderson*, 331 U.S. 461 (1947). The first borrowing statute was enacted in Ohio as part of the Code of Civil Procedure Act of March 14, 1853 and did not differ substantively from the statute as it existed at the time of its repeal. *See Hilliard v. Pennsylvania Railroad*, 73 F.2d 473 (6th Cir. 1934), *cert. denied*, 294 U.S. 721 (1935). The court in *Hilliard* recognized that the purpose of the Ohio borrowing statute was to restrict the limitation period as to causes of action arising in other states to the period of limitation established in such states, rather than to allow the application of a longer Ohio statute of limitations. 73 F.2d at 476. In *Cope*, this Court held that a "cause of action," for purposes of the Ohio borrowing statute, is the fact or combination of facts giving right to a cause of action, the existence of which affords a party a right to judicial interference in his behalf. 331 U.S. at 466. With respect to contractual causes of action, the Ohio Supreme Court held that the borrowing statute required the application of a foreign statute of limitations when the contract forming the basis of the Ohio action was executed and was to be performed in another state. *Alropa Corp. v. Kirchwehm*, 138 Ohio St. 30, 33 N.E.2d 655 (1941); *Payne v. Kirchwehm*, 141 Ohio St. 384, 48 N.E.2d 224 (1943).

Although the Ohio legislature repealed the borrowing statute in 1965, the Ohio Supreme Court has subsequently held that the rule articulated in *Pinney* remains the law of Ohio. *Howard v. Allen*, 30 Ohio St. 2d 130, 283 N.E.2d 167 (1972). In *Howard*, the court applied the shorter Ohio statute of limitations to a cause of action that accrued in South Carolina. In so holding, the court restated the entire rule of *Pinney* as the law of Ohio, including the provision that the Ohio statute of limitations will be applied when the period of limitation of the state where the action arose is not shorter than that specified by the Ohio statute. 283 N.E.2d at 169.

In the present case, without citing that decision, the court of appeals ignored the holding of the Ohio Supreme Court in *Howard* that the conflict-of-laws common law rule adopted in *Pinney* remains the law of Ohio even after the legislative repeal of the Ohio borrowing statute. *Cole*, 133 F.3d at 437. The court also dismissed as dicta its statement in *Phelps* that Ohio common law retains the borrowing rule of *Pinney*. *Id.* The court declared that, in *Phelps*, it had overlooked the fact that the Ohio legislature repealed the borrowing statute in 1965. *Id.* The court did not recognize, however, that the Ohio Supreme Court in *Howard* reaffirmed the common law rule of *Pinney* after the legislative repeal of the borrowing statute. *Id.*

Rather than applying the common law conflict-of-laws rule of *Pinney*, the court of appeals concluded that the rule applicable to conflict-of-laws issues involving statutes of limitations is that found in the Restatement (Second) of Conflict of Laws § 142(2) (1989). Section 142(2) provides that a forum will apply its own statute of limitations permitting a claim unless (a) maintenance of the claim would serve no substantial interest of the forum, and (b) the claim would be barred under the statute of limitations of a state having a more

significant relationship to the parties and the occurrence.[4] Comment g to § 142 discusses the situation when the forum state has a longer statute of limitations than another state having a significant relationship to the parties and the occurrence. Comment g provides that when the domicile of the plaintiff is in the forum state and that of the defendant is in the other state with the most significant relationship to important issues in the case, the forum should entertain the claim only in extreme and unusual circumstances. Comment g goes on to explain that a claim that is not barred by the local statute of limitations should not be entertained if no interest of the forum state would be served by entertaining the claim and the claim would be barred by the statute of limitations of the alternative forum.

In light of the foregoing, it is far from certain that the Ohio statute of limitations would apply even if § 142 of the Restatement were to control. The court of appeals, however, made no findings with regard to which state, Ohio or California, has a more significant relationship to the parties and the occurrence. The record indicates that California has the more significant relationship to the parties and the occurrence than does Ohio. While the negotiations and execution of the Agreement occurred in both California and Ohio, the parties themselves chose California law to govern any litigation that might ensue. Because all other contacts are equal, the parties' own characterization of their Agreement as more appropriately controlled by California law is sufficient to tip the balance in favor of the application of the California statute of limitations, pursuant to § 142 of the Restatement.

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[4]The court of appeals applied § 142 of the Restatement as that section existed in 1971. Section 142 was revised in 1988 to read as set forth in the preceding sentence.

The court of appeals made a more fundamental error, however, than its failure to conduct the analysis necessary to determine which statute of limitations should be applied under § 142 of the Restatement. The Ohio Supreme Court has not adopted the Restatement (Second) of Conflict of Laws as controlling with respect to statutes of limitations. In *Morgan v. Biro Manufacturing Co.*, 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984), and *Lewis v. Steinreich*, 73 Ohio St. 3d 299, 652 N.E.2d 981 (1995), both cited by the court of appeals, the Ohio Supreme Court adopted the Restatement for application to conflicts in substantive law, and not in statutes of limitations. The decision in *Males v. W.E. Gates & Associates*, 29 Ohio Misc. 2d 13, 504 N.E.2d 494 (C.P. 1985), also cited by the court of appeals, was rendered by an Ohio trial court. The *Males* court applied § 142 of the Restatement before it was revised in 1988. In applying § 142, the court in *Males* explicitly recognized that the Ohio Supreme Court had not adopted the Restatement in a case involving a statute of limitations issue. 504 N.E.2d at 495. Thus, the current state of Ohio law as declared by the Ohio Supreme Court is that the common law conflicts rule of *Pinney* applies to require the application of a shorter foreign statute of limitations to a cause of action brought in a court of Ohio. For these reasons, the conclusion of the court of appeals that the applicable conflict-of-laws rule is the one set forth by the Restatement was incorrect and resulted in the subjection of Mileti to a claim that was time-barred by Ohio law.

Under the applicable rule of *Pinney*, the period of limitation relevant to Cole's claim against the Petitioner had expired when Cole filed his action in the district court. Cole's contract claim against Mileti accrued in California, where Mileti allegedly failed to perform the contract. In designating the law of California to govern disputes arising under the Agreement, Cole and Mileti themselves recognized that any breach would occur in California. Cole performed all of his obligations simultaneously with the execution of the

Agreement. The only obligations demanding future performance were those of Mileti to pay Cole's indebtedness to the Equitable Bank of Baltimore as it became due. Mileti's promise to pay was breached, if at all, by his failure to act in making the required payments. Mileti acted or failed to act in California, where he lived. The court of appeals erroneously failed to apply Cal. Civ. Proc. Code § 337 to the claim, as was required by Ohio law. The court's misstatement of the applicable rule of law resulted in a marked departure from the accepted practice fixed by Ohio law. As a result, the Petitioner was subjected to a claim that was time-barred and judgment was entered against him on that claim. These circumstances are such as to necessitate a remand in order to allow the application of the correct rule of law.

CONCLUSION

For the reasons discussed herein, the Petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioner

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1997

NICK J. MILETI,

PETITIONER,

v.

MARCIA N. COLE,
REPRESENTATIVE OF THE ESTATE OF
JOSEPH E. COLE,

RESPONDENT.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

APPENDIX

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Marcia N. COLE, Representative of the Estate of Joseph E. Cole, Plaintiff-Appellee,

v.

Nick J. MILETI, Defendant-Appellant.

No. 96-4214.

United States Court of Appeals, Sixth Circuit.

Submitted Oct. 23, 1997.

Decided Jan. 8, 1998.

Joshua R. Cohen (briefed), Kohrman, Jackson & Krantz, Cleveland, OH, for Plaintiff-Appellee.

Albert A. Yannon (briefed), Hilliard, OH, for Defendant-Appellant.

Before: MERRITT, WELLFORD, and MOORE, Circuit Judges.

MERRITT, J., delivered the opinion of the court, in which MOORE, J., joined.

WELLFORD, J. (pp. 438-39), delivered a separate dissenting opinion.

MERRITT, Circuit Judge.

OPINION

In this diversity case, defendant Mileti appeals the Magistrate's judgment in favor of plaintiff Cole, arguing that the Magistrate, after improperly asserting personal jurisdiction over him, erroneously applied Ohio's statute of limitations to a breach of contract action governed by California law. We conclude that the Magistrate had jurisdiction over Mileti and properly applied Ohio's statute of limitations.

I.

This dispute arises from a surety agreement between defendant Mileti and plaintiff's decedent, Joseph Cole. In 1983, Mileti co- produced a motion picture with Robert Altman called "Streamers" and organized Streamers International Distributors, Inc., a California corporation, to purchase and distribute the film. Cole was an initial investor in the corporation. He purchased two hundred shares of Streamers stock, lent the corporation $475,000, and became one of its officers and directors. To fund his investment, Cole secured a loan from Equitable Bank of Baltimore. The film was not a success. Mileti offered to buy Cole's share of the corporation in exchange for Cole's resignation as an officer and director. Accordingly on September 4, 1984, the parties executed the surety agreement at issue in which Cole transferred his stock and indebtedness to Mileti, who in return agreed to repay the Bank by June 16, 1985.

Mileti and Cole were business associates in Cleveland, Ohio in the 1970s. In 1979, Mileti moved to California where he became a movie producer. He was a California resident at all times relevant to the negotiation of this surety agreement. Cole continued to live in Cleveland throughout the Streamers project. He was therefore an Ohio resident when he executed this contract. When "Streamers" failed at the box office in early 1984, Mileti began negotiating with Cole to buy out his share

of the corporation. On February 6, 1984, Cole's lawyer sent Mileti a written draft integrating their agreement. Thereafter, telephone calls concerning the September 4, 1984 agreement were exchanged between California and Ohio. The record also contains a letter dated August 17, 1984, that refers to these negotiations and to Cole's resignation. Mileti subsequently signed the contract in California and sent it back to Ohio, where Cole executed it. The parties agreed that the contract would "be governed and construed in accordance with the laws of the State of California."

Mileti failed to repay the loan by June 16, 1985, as required by the contract, so Cole continued to make sporadic payments to the Bank until 1992, when the Bank sued him to recover the balance. Cole settled that dispute with the Bank for $310,000. He eventually brought this diversity action in the Northern District of Ohio on May 24, 1994, nine years after the alleged breach. Cole's widow, Marcia Cole, was substituted as the plaintiff in this action after Cole died on January 8, 1995.

After the district court rejected Mileti's motion to dismiss this suit for lack of personal jurisdiction, the parties consented to the jurisdiction of a U.S. Magistrate and filed simultaneous motions for summary judgment. The Magistrate granted summary judgment to Ms. Cole after concluding that personal jurisdiction existed and finding that the action was not barred by California's four-year statute of limitations. On written stipulations, the Magistrate entered a final judgment against Mileti for damages of $988,861.89 and prejudgment interest of $470,728.66. Mileti appealed the Magistrate's judgment directly to this Court pursuant to 28 U.S.C. § 636(c)(3) and Fed. R. Civ. P. 73(c).

II.

Mileti first argues that the Magistrate's assertion of personal jurisdiction over him was fundamentally unfair and

therefore unconstitutional. To determine whether personal jurisdiction exists over a nonresident defendant, federal courts apply the law of the forum state, subject to the constitutional limits of due process. *Compuserve v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996); *Theunissen v. Matthews*, 935 F.2d 1454, 1459 (6th Cir. 1991). The Magistrate below therefore properly applied the Ohio long-arm statute, which provides:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state. . . .

Ohio Rev. Code § 2307.382(A)(1). Although the Ohio Supreme Court recently held this portion of the statute does not reach to the limits of the Due Process Clause, *see Goldstein v. Christiansen*, 638 N.E.2d 541, 545 n.1 (Ohio 1994) (per curiam), our central inquiry is whether Mileti established certain minimum business contacts with Ohio so that the Magistrate's exercise of personal jurisdiction over him did not offend "traditional notions of fair play and substantial justice." *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The Sixth Circuit has established a three-part test to determine whether specific jurisdiction exists over a nonresident defendant like Mileti. First, the defendant must purposefully avail himself of the privilege of conducting activities within the forum state; second, the cause of action must arise from the defendant's activities there; and third, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make its exercise of jurisdiction over the defendant fundamentally fair. *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins.*

Co., 91 F.3d 790, 794 (6th Cir. 1996); *Southern Machine Co. v. Mohasco Industries Inc.*, 401 F.2d 374, 381 (6th Cir. 1968).

If, as here, a nonresident defendant transacts business by negotiating and executing a contract via telephone calls and letters to an Ohio resident, then the defendant has purposefully availed himself of the forum by creating a continuing obligation in Ohio. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76, 479 (1985); *Compuserve*, 89 F.3d at 1263-64; *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (1988); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 228, 235 (1972). Furthermore, if the cause of action is for breach of that contract, as it is here, then the cause of action naturally arises from the defendant's activities in Ohio. *See Compuserve*, 89 F.3d at 1267; *In-Flight Devices*, 466 F.2d at 229. Finally, when we find that a defendant like Mileti purposefully availed himself of the forum and that the cause of action arose directly from that contact, we presume the specific assertion of personal jurisdiction was proper. *Compuserve*, 89 F.3d at 1268; *First National Bank of Louisville v. J.W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6th Cir. 1982). In light of this precedent, we have no doubt that the Magistrate's assertion of jurisdiction over Mileti was fundamentally fair and constitutional. *See McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Compuserve*, 89 F.3d at 1268; *In- Flight Devices*, 466 F.2d at 235-36; *Southern Machines*, 401 F.2d at 380.

III.

A more complex issue arises from Mileti's claim that the Magistrate improperly applied Ohio's longer, rather than California's shorter, statute of limitations to this contract dispute, which is governed in substance by California law. We review this issue de novo. *Holmes v. Donovan*, 984 F.2d 732, 735 (6th Cir. 1993).

Ohio law provides a fifteen-year statute of limitations for breach of a written contract. Ohio Rev. Code § 2305.06. California law provides a four-year statute of limitations. Cal. Civ. Proc. Code § 337. In addition, Ohio's now-repealed borrowing statute previously required courts sitting in Ohio to apply a foreign state's statute of limitations if it was shorter than Ohio's, Ohio Rev. Code. § 2305.20, but the Ohio legislature got rid of that provision on November 5, 1965. *See Loughan v. Firestone Tire & Rubber Co.*, 624 F.2d 726, 729 & n.9 (5th Cir. 1980) (citing *Thigpen v. Greyhound Lines, Inc.*, 229 N.E.2d 107 (Ohio App. 1967)).

It is well-established that federal courts sitting in diversity must apply the choice- of-law rules of the forum state. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941); *Charash v. Oberlin College*, 14 F.3d 291, 296 (6th Cir. 1994). Mileti does not dispute this proposition. Rather, he erroneously contends the Ohio courts have judicially preserved the effect of Ohio's old borrowing statute, notwithstanding the fact that the Ohio legislature repealed the statute over thirty years ago. Consequently, Mileti argues, Ohio's choice of law rules still required the Magistrate below to borrow California's shorter statute of limitations when it conflicted with Ohio's longer statute.

The Ohio Supreme Court has adopted the *Restatement (Second) of Conflict of Laws* as the governing law for Ohio conflicts issues. *Lewis v. Steinreich*, 652 N.E.2d 981, 984 (Ohio 1995); *Morgan v. Biro Mfg. Co., Inc.*, 474 N.E.2d 286, 288-89 (Ohio 1984). When a conflict arises between two states' statutes of limitations, the Restatement provides:

> An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state.

Restatement (Second) of Conflict of Laws § 142(2). Section 142(2) thus requires Ohio courts to apply Ohio's statute of limitations to breach of contract actions brought in Ohio, even if the action would be time-barred in another state. *See Males v. W.E. Gates & Associates*, 504 N.E.2d 494, 494-95 (Ohio Com. Pl. 1985) (applying Ohio's fifteen-year statute of limitations to a breach of contract action that would have been barred by Virginia's five-year statute); *cf. Mahalsky v. Salem Tool Co.*, 461 F.2d 581, 586 (6th Cir. 1972) (holding this rule does not deny full faith and credit); *Mackey v. Judy's Foods, Inc.*, 867 F.2d 325, 328-29 (6th Cir. 1989) (affirming the district court's application of a similar rule in Tennessee). There is no question that this rule is both fair and constitutional. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) ("[T]he Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State."); *Charash*, 14 F.3d at 299.

Accordingly, given the repeal of Ohio's borrowing statute, the Magistrate properly applied Ohio's statute of limitations to allow Cole's action for breach of contract, even though California law would have barred the same claims. Mileti argues, however, that Sixth Circuit precedent compels the opposite conclusion. Citing dicta from *Phelps v. McClellan*, 30 F.3d. 658 (6th Cir. 1994), he argues the law in this Circuit says that the Ohio common law has preserved the Ohio borrowing statute. Admittedly, *Phelps* did contain language to that effect, *id.* at 661-62, but that language was unnecessary to the resolution of *Phelps* because Ohio's statute was shorter, not longer, than the conflicting state's. Furthermore, in this dicta our Court in *Phelps* apparently overlooked the fact that the Ohio legislature repealed its borrowing statute over thirty years ago and that the Ohio Supreme Court had replaced that rule with § 142(2) of the *Restatement (Second) of Conflict of Laws*. The decision below properly followed the requirements of § 142(2).

Finally, Mileti argues that the Magistrate below should have applied California's statute of limitations because the parties chose California law to govern their contract. Sixth Circuit precedent provides otherwise. In two recent cases we have held that contractual choice-of-law clauses incorporate only substantive law, not procedural provisions such as statutes of limitations. *Phelps*, 30 F.3d at 662; *Charash*, 14 F.3d at 299. Absent an express statement that the parties intended another state's limitations statute to apply, the procedural law of the forum governs time restrictions on an action for breach, while the law chosen by the parties governs the terms of their contract. *Phelps*, 30 F.3d at 662. As the Magistrate below concluded, Ohio's fifteen-year statute of limitations allowed this action against Mileti for breach of contract, though the parties chose California law to govern its substantive terms.

Accordingly, we affirm the Magistrate's judgment below.

DISSENT

HARRY W. WELLFORD, Circuit Judge, dissenting.

I believe that the assertion of personal jurisdiction over Mileti offends "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Mileti moved to California from Ohio in 1979. Calls and correspondence between Mileti in California and Cole in Ohio took place in 1984, resulting in the subject contract which the parties agreed would be construed in accordance with California law. It was not until 1994 that the plaintiff sought to hold Mileti responsible for breach of contract in Ohio.

International Shoe, the seminal case on the subject of personal jurisdiction, involved an assertion of personal jurisdiction in Washington over a nationwide shoe company

based on the allegation that the company was doing business in that state. Jurisdiction over a foreign corporation doing some degree of business within a state involves entirely different jurisdictional considerations than personal jurisdiction over a nonresident individual with few contacts within the forum state. Even a corporation's conducting a single activity or "isolated items of activities" were not considered to be sufficient to establish personal jurisdiction if it maintained no property, business, or agency in the state. *International Shoe*, 326 U.S. at 317. *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790 (6th Cir. 1996), also involved a corporate defendant. *Nationwide* held, among other things, that:

> [T]he existence of a contract with a citizen of the forum state, standing alone, will not suffice to confer personal jurisdiction over a foreign defendant. *Burger King*, 471 U.S. at 478, 105 S.Ct. at 2185. Rather, "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." *Id.* at 479, 105 S.Ct. at 2185-86. Further, "[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984). . . .

We give plenary review to the district court's decision regarding personal jurisdiction. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1261 (6th Cir. 1996). Cole bears the burden of establishing jurisdiction over Mileti in Ohio. *Id. See also American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1168 (6th

Cir. 1988). "[T]he defendant must be amenable to suit under the forum state's long-arm statute and the due process requirements of the Constitution." *Reynolds v. I.A.A.E.*, 23 F.3d 1110, 1115 (6th Cir. 1994), *quoted in CompuServe*, 89 F.3d at 1262. This court must examine the limits of the statute and due process.

The majority sets out the tests this court adopts in these situations, but they are usually applied to corporations conducting some modicum of business in the forum state. *CompuServe* involved an individual conducting an internet business, Flashpoint Development, which placed software on CompuServe's communications system in Ohio. The agreement in *CompuServe* provided that Ohio law governed, and defendant "transmitted 32 master software files to CompuServe." *CompuServe*, 89 F.3d at 1261. The dispute in the *CompuServe* case involved deceptive trade practices—ongoing actions, unlike the single transaction involved herein. Therefore, *CompuServe* does not support the argument that Mileti "should reasonably [have] anticipate[d] being haled into court" in Ohio. *Id.* at 1263 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985)). Rather, I believe Mileti's contacts in Ohio, after his 1979 departure, to have been "attenuated." *Id. Compare Reynolds*, 23 F.3d at 118-21,and *Health Communications, Inc. v. Morisier Corp.*, 860 F.2d 460, 463-65 (D.C. Cir. 1988).

> Each case involving the issue of personal jurisdiction over a nonresident defendant must be decided on its own facts. Most of the cases we have examined have involved tort claims against nonresident manufacturers or suppliers, or breach of contract claims.
>
> . . .

> The two related functions of the minimum contacts requirement are that it protects a defendant from the burden of litigating in an inconvenient forum and prevents the states from reaching out, through their courts, "beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980).

American Greetings, 839 F.2d at 1169.

This is a case between two individuals. It does not involve an Ohio corporation whose activities with nonresidents may occasion special interests or concerns in Ohio. I would find that Mileti has not been shown by the plaintiff to have any "substantial connection" in or with Ohio, nor that he would have been lead "reasonably to believe that he was subjecting himself to the processes of the [Ohio] jurisdiction." *American Greetings*, 839 F.2d at 1169.

For the foregoing reasons, I believe personal jurisdiction in Ohio over California resident Mileti offends notions of fairness and equity in this case. Accordingly, I **DISSENT** because Mileti's motion to dismiss should have been granted. Plaintiff has simply failed in her burden of proof.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Marcia N. Cole,	:	Case No. 1:94CV1074
	:	
Plaintiff	:	
	:	
v.	:	Magistrate Judge David S. Perelman
	:	
Nick J. Mileti,	:	MEMORANDUM OPINION
	:	AND ORDER
Defendant	:	

Currently before this Court are the parties' cross motions for summary judgment, with the defendant's alternative motion to dismiss for lack of personal jurisdiction.[1]

This action was initiated by Mr. Joseph E. Cole against the defendant, Mr. Nick J. Mileti, alleging breach of a written agreement entered into by the parties on September 4, 1984 (hereinafter the Agreement). Mr. Cole died approximately eight months after filing suit, which resulted in the substitution of his wife, Ms. Marcia N. Cole, as plaintiff herein.

The Agreement related to Mr. Cole's investment in Streamers International Distributors, Inc., a corporation formed by the defendant for the purchase of a commercial motion

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[1]Although defendant's brief is captioned, "Memorandum In Opposition to Plaintiff's Motion For Summary Judgement and In Support of Defendant's Motion For Summary Judgment," his arguments in support of the jurisdictional issue were articulated as seeking dismissal and the conclusory section of his brief explicitly requested dismissal as an alternative disposition.

picture, *Streamers*, which defendant co-produced with Mr. Robert Altman in 1983. The nature of that transaction is reflected in the following recitals included in the Agreement:

A. Streamers International Distributors, Inc., a California corporation ("Company"), was formed in June, 1983. Cole purchased common stock of Company for $200,000 (200 shares at a price of $100 per share). The shares of common stock purchased by Cole constitute one-third of the issued and outstanding common stock of Company. Cole is vice president and one of three directors of Company.

B. Company acquired the ownership of and has engaged in the distribution of a motion picture entitled "Streamers" (the "Transaction"). The Motion Picture Acquisition Agreement by which the Company acquired the ownership of "Streamers" was ratified by unanimous action of the Board of Directors of Company.

C. In furtherance of the Transaction, Cole loaned Company $300,000 on June 17, 1983, and $175,000 on August 15, 1983, and the Company executed and delivered to Cole promissory notes in these amounts with interest thereon at 12%. Such promissory notes have become due but have not been paid, and the interest thereon has not been paid.

D. The money which was used by Cole to purchase stock of the Company and to make loans to the Company as described above was borrowed by Cole from Equitable Bank of Baltimore (the "Bank"). Cole executed a loan agreement ("Agreement") and promissory note ("Note") for a maximum principal amount of $800,000 with interest to accrue thereon "at a floating and fluctuating per annum rate of interest equal at all times to the Bank's Prime Rate of interest in effect from time to time." The Agreement authorizes Bank to pay accrued and unpaid interest on the loan from time to time by making additional advances which are thereupon added to the outstanding principal balance of the loan. The entire loan is due and payable in full upon the earlier to occur of (a) June 16, 1985, or (b) such time as the outstanding principal amount of the loan reaches $800,000.

E. Mileti has agreed to purchase Cole's stock of the Company upon the terms hereafter provided....

The next paragraph of the Agreement, Paragraph 1 on page two, is at the heart of the dispute between the parties. In that paragraph the defendant agreed to assume obligations which plaintiff alleges were unfulfilled:

1. Mileti hereby absolutely and unconditionally undertakes and assumes the responsibility for the payment and

performance of each and every liability and obligation of Cole, when due, pursuant to the terms of the Agreement and Note between Cole and Bank [Equitable Bank of Baltimore], including, but not limited to, the timely repayment of all monies borrowed pursuant to the Agreement and Note, together with all interest payments, late charges and other costs and expenses relating thereto. Cole agrees that Cole will not obtain any additional advances of principal upon the Note and therefore the only additions to principal will be for payment of interest costs or charges as they accrue. Mileti agrees that all monies owed the Bank by Cole pursuant to the Agreement and Note shall be repaid in accordance therewith not later than the close of business on June 16, 1985, and Mileti will not seek or agree to any extensions or modifications of the obligations arising out of or relating to the agreement or Note.

Related to the foregoing is Paragraph 3, in which the parties agreed as follows:

3. Mileti agrees and undertakes to indemnify Cole and hold Cole harmless against all expenses (including attorneys' fees), judgments, costs, losses, damages and liabilities arising out of Cole's borrowings from Bank, Cole's purchase of stock in Company, Cole's loans to Company, or any liability of Coles as a director,

> shareholder and/or officer of Company arising out of Company's action or inaction. Concurrently herewith, Cole is delivering to Mileti his written resignation as vice president and director of Company.

Under the terms of the Agreement the plaintiff was bound to resign as vice president and director of Streamers International Distributors, Inc., to convey to the defendant his entire interest in that company, which included 200 shares of stock, and to forgive that company's indebtedness to plaintiff in the total amount of $475,000, plus interest. However, as the following subparagraph states, plaintiff was entitled to retain stock certificates and promissory notes as security:

> (iii) Cole will continue to hold the stock certificates and promissory notes as pledged security for the due performance of Mileti's obligations under Paragraph 1, which obligations will be deemed performed if they are assumed by a major/U.S. motion picture production/distribution company. Upon performance of such obligations, Cole will deliver to Mileti the stock certificate evidencing such stock, together with an assignment thereof to Mileti executed by Cole, and said promissory notes.

The contractual language included a provision which limited the terms of the Agreement to those expressly stated therein:

> 7. This agreement constitutes the entire agreement between the parties. There are not and shall not be any verbal statements, representations, warranties,

> undertakings or agreements between the parties, and this agreement may not be amended or modified in any respect except by written instrument signed by the parties hereto.

The parties also agreed that the terms of the Agreement would "inure to the benefit of Cole and Mileti and their respective heirs, estates and personal representatives."

As called for under the Agreement, Mr. Cole resigned as director and vice president of Streamers International Distributors, Inc. Mr. Mileti, however, failed to pay any of the amounts owed by Mr. Cole to Equitable Bank, as called for under the Agreement.

Consequently, although Mr. Cole had been making payments to Equitable Bank, in 1992 the bank initiated collection litigation on the unpaid balance of the debt. That action was eventually settled, with the parties thereto agreeing that payment of $310,000 by Mr. Cole would satisfy his obligation.[2]

Mr. Cole then initiated this action for breach of contract, seeking to recover the amounts he had paid to Equitable Bank.

Turning to the parties' motions, the first issue which must be dealt with is a challenge to this Court's personal jurisdiction over the defendant.

As he did in a motion to dismiss filed with Judge Oliver prior to transfer of the action to this Court pursuant to 28

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[2]Plaintiff alleges that the total sum of the payments made by Mr. Cole to Equitable Bank was $940,672.28.

U.S.C. § 636(b), the defendant argues that this district court lacks personal jurisdiction over him because, as a non-resident whose business is conducted in another state, he did not have sufficient contacts with the State of Ohio to support the exercise of long-arm jurisdiction.

In an opinion dated April 12, 1995, Judge Oliver denied the defendant's motion to dismiss, concluding, upon in depth consideration of the pertinent case authorities on the jurisdictional question, that the plaintiff had "made out a *prima facie* case that Mileti's alleged breach of contract would result in damage to an Ohio resident for which Mileti could foresee being called into an Ohio Court to defend." He further held that because such ruling was premised upon the pleadings, affidavits and other relevant legal documents it was not deemed as one on the merits, and that the defendant would be permitted to raise the issue at a later point in the proceedings, which has now been done.

This Court adopts Judge Oliver's extensive analysis on the law pertaining to personal jurisdiction, and, applying that analysis to the more extensive facts presented based upon the discovery undertaken by the parties, for the same reasons articulated by Judge Oliver,[3] reaches the conclusion that there

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[3]This Court would add one caveat. In analyzing the requirements of the three-part test to determine whether the state long-arm statute should be applied, Judge Oliver held that in a breach of contract case such as this, the first element (that the defendant purposely avail himself of the privilege of acting in the forum state or causing consequences in the forum state) is satisfied by entering into a contract with an Ohio resident, and the second element (that the cause of action arise from the defendant's activities there) is satisfied "when a defendant breaches the contract." While it is true that at this point this Court has not yet stated the holding that there was a breach of

is personal jurisdiction over the defendant. Consequently, defendant's motion to dismiss for lack of personal jurisdiction must be denied.

Having concluded that there is personal jurisdiction over the defendant, the issues posed under parties' cross motions for summary judgment will be considered.

The disposition of a motion for summary judgment is governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the granting of such motion only where, "[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." It is the court's function under such a motion to determine whether a genuine issue of material fact exists, as opposed to endeavoring to resolve any such factual issues. *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974); 6 *Moore's Federal Practice* 56.15 [1.-0].

It is the initial burden of the moving party to demonstrate the absence of a genuine issue of material fact as to an essential element of the claims brought by the non-moving party. *Curto v. Harper Woods*, 954 F.2d 1237, 1241(6th Cir. 1992); *Wilson v. Zanesville*, 954 F.2d 349, 350-351 (6th Cir. 1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989).

In *Street v. J.C. Bradford & Co.*, *supra*, the Sixth Circuit Court of Appeals reviewed three then recent decisions of the United States Supreme Court addressing summary

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contract, the defendant has acknowledged in his submissions to the Court and upon deposition that he did not comply with the terms of the written agreement at issue.

judgment practice, *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)[4]. The court summarized those cases as standing for a number of new principles in summary judgment practice, including the fact that cases involving considerations of state of mind issues (such as discriminatory action) are not automatically inappropriate for summary judgment; that a federal directed verdict standard ("whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law") should be applied to summary judgment motions; that a non-moving party must provide "more than a mere scintilla of evidence" to avoid summary judgment; that the substantive law applicable to the cause of action will govern the materiality of the issues of fact; that the court has no duty to search the record to determine the existence of genuine issues of material fact; and perhaps most significant, that a trial court has more discretion than it would have in the past in weighing the evidence offered by the non-moving party, considered in light of the whole record, to determine whether that party's evidence does "more than simply show that there is some metaphysical doubt as to the material facts" or whether it demonstrates that the non-moving party's claims are "implausible". *Id.* at 1479-1480 (Footnotes and citations omitted.)

The parties agree that a choice of law provision found at paragraph 8 of the Agreement stating "This agreement shall be governed and construed in accordance with the laws of the

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[4]The Court's reference to those rulings as representing a "new era" of "dramatic change" may no longer hold true nine years later, but the characterization of their import as to motions for summary judgment being viewed with "more favorable regard" certainly remains true.

State of California" is to be applied by this Court, which is consistent with a holding by the Sixth Circuit [Court] of Appeals that "Ohio choice-of-law principles strongly favor upholding the chosen law of the contracting parties." *Tele-Save Merchandising Co. v. Consumers Distrib. Co.*, 814 F.2d 1120, 1122 (6th Cir. 1987). That principle is to be followed provided that there is a reasonable nexus between the dispute and the state denoted as providing the controlling law. *CIT Group\Equipment Financing Inc. v. New GIFL, Inc.*, 823 F.Supp. 479, 483-84 (N.D. Ohio 1993), citing *Schulke Radio Productions Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St.3d 436, 453 N.E.2d 683 (1983), and this Court finds that nexus to be agreed to by the parties.

The defendant urges this Court to find that California's statute of limitations for contract cases is operative in the instant case, and that it serves to preclude the plaintiff's claims as being untimely filed. In support of this position the defendant relies upon the decision of the Sixth Circuit in *Phelps v. McClellan*, 30 F.3d 658 (6th Cir. 1994), arguing that such ruling establishes: (1) that "Statutes of limitations are categorized as substantive for the purpose of a Federal Court's application of state law;" (2) that a case such as this breach of contract action provides an exception to the notion that a forum state's statute of limitations is applied where another state's law has been chosen to provide the rules of decision; and (3) that under Ohio law the Ohio statute of limitations is to be applied "only if the relevant limitation period under the law of the state where the injury occurred is longer than Ohio's." The defendant argues that the foregoing mandates the application of California's four-year statute of limitations upon breach of contract actions.

In this Court's opinion, the defendant's analysis of *Phelps* and its application to the circumstances of this suit are faulty. While the court in *Phelps* stated that "Statutes of limitations are classified a *substantive* for *Erie* purposes," that

statement was directly followed by "[B]ut interestingly, statutes of limitations are characterized as *procedural* for purposes of choice of law analysis in Ohio and most other states[.]" *Id.* at 661. (Citations and footnotes omitted.) The significance of this is that although a federal court exercising diversity long-arm jurisdiction must look to the forum state's choice of law statute in order to determine which state's substantive law controls, that court must apply the procedural law, including statutes of limitations, of the forum state. *Mackey v. Judy's Foods, Inc.*, 867 F.2d 325, 328 (6th Cir. 1989). *Accord, Charash v Oberlin College*, 14 F.3d 291, 299 (6th Cir. 1994). In that regard this Court finds the following language of the Sixth Circuit Court of Appeals to be particularly instructive:

> The rule in Ohio is that statutes of limitations of the forum state are applied even if the facts of the case creating the cause of action dictate the use of other substantive law.[5]

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[5]The *Phelps* court considered the question of whether in diversity cases involving differing statutes of limitations of two states the court should follow the rule articulated in the Restatement that "the forum will apply its own statute of limitations barring the claim," Restatement (Second) of Conflicts of Law § 142(1) (1988), or the Ohio common law that the Ohio statute of limitations applies "only if the relevant limitations period under the law of the state where the injury occurred was longer than Ohio's or nonexistent[.]" *Phelps v. McClellan, supra* at 661. The court abstained from deciding the issue, however, since under the circumstances of that case the same period would apply under either rule. *Id.* at 662. This Court notes that in stating the common law rule the Sixth Circuit panel relied heavily on a case decided in 1875, *Pinney v. Cummings*, 26 Ohio St. 46 (1875), while the Ohio courts in recent cases have followed the rule articulated in *Charash*. *See Howard v. Allen*, 30 Ohio St.2d 130, 133, 283 N.E.2d 167

Ibid. Furthermore, the United States Supreme Court has held:

> This Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different state. We granted certiorari to reexamine this issue. We conclude that our prior holdings are sound.

Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988), cited in *Charash v Oberlin College, supra* at 299.

Based upon the foregoing, this Court holds that the Ohio fifteen year statute of limitations governing claims of breach of a written contract, Ohio Revised Code § 2305.06, applies in the present case. Consequently, as this action was initiated within that statutory period, the plaintiff's claims are not barred.

Each of the parties claims entitlement to summary judgment on the merits of the cause of action for breach of contract.

The parties agree that under the law of California the following four elements must be proven in order to establish a breach of contract:

(1972); *Barile v. University of Virginia*, 30 Ohio App.3d 190, 191, 507 N.E.2d 448 (1986). Further, from the face of the *Phelps* decision one might reasonably conclude that the parties did not include in their submissions to the court the fact that although Ohio statutory law once mirrored the common law rule requiring a court to decide which state's statutory period was longer that statute, Ohio Revised Code § 2305.20, was repealed by the Ohio legislature as of November 5, 1965.

(1) the creation of a valid agreement between the plaintiff and defendant;

(2) the plaintiff's adherence to the terms of the instrument;

(3) the defendant's violation of his contractual duties; and

(4) damages resulting to the plaintiff as a result of this unlawful conduct.

Lortz v. Connell, 273 Cal. App.2d 286, 290, 78 Cal. Rptr. 6, 8 (1969).

The defendant has conceded, both in his submissions to this Court and during his deposition testimony, that he executed the Agreement at issue in these proceedings. Yet having done so, he now challenges the validity of that contract. In derogation of explicit terms of the contract, the defendant maintains that the parties entered into the Agreement as a method of reducing the plaintiff's potential tax liability and that they never intended that he would actually satisfy the plaintiff's debt with Equitable Bank. Essentially, what defendant argues is that the parties had a collateral oral agreement that the written agreement, under which the defendant undoubtedly was bound to satisfy plaintiff's debt with Equitable Bank, had no legal effect.

The parties disagree as to whether evidence of any such oral agreement is admissible in this action, or whether it must be excluded as parol evidence, but do agree that under the law of California the question of whether the written contract was integrated, i.e., expressed the entire agreement between the parties, is a question of substantive law for this Court to decide. *Alling v. Universal Mfg. Corp.* (1992) 5 Cal.App.4th 1412, 1434, 7 Cal.Rptr.2d 718, 732; *Stevenson v. Oceanic Bank*

(1990) 223 Cal.App.3d 306, 316, 272 Cal.Rptr. 757, 763, quoting *Mobil Oil Corp. v. Handley*, (1978) 76 Cal.App.3d 956, 961, 143 Cal.Rptr. 321 (Citations omitted.)

The California parol evidence rule is defined by that state's Code of Civil Procedure, Section 1856 (as amended in 1978), which provides:

> (a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.
>
> (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement.
>
> (c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance.
>
> (d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and

exclusive statement of the terms of the agreement.

(e) Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue.

(f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue.

(g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or other wise interpret the terms of the agreement, or to establish illegality or fraud.

(h) As used in this section, the term agreement includes deeds and wills, as well as contracts between parties.

This Court, therefore, must first determine whether the Agreement on its face appears to be an integrated agreement, that is "whether the parties intended the written instrument to serve as the exclusive embodiment of their agreement." *Banco do Brasil v. Latian. Inc.* (1991) 234 Cal.App.3d 973, 1000-1001, 285 Cal.Rptr. 870, 885-886, citing *Salyer Grain & Milling Co. v. Henson* (1970) 13 Cal.App.3d 493, 498. While it is true an integration clause may be conclusive on the subject, under California law it is also true that the question implicates the intent of the contracting parties which, in turn, may call for "consideration of relevant extrinsic evidence that explains but does not flatly contradict the writing." *Stevenson v. Oceanic*

Bank, supra. Accord, *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1434, 7 Cal.Rptr.2d 732, quoting *Masterson v. Sine, supra*, 68 Cal.2d at pp. 227-230, 65 Cal.Rptr. 545. Stated differently, when considering the issue of integration a court may look to "whether a claimed collateral agreement involves terms that would 'naturally' have been included in the writing." *Ibid.*

As previously set out herein, the integration clause of the Agreement specifically recognized that "This agreement constitutes the entire agreement between the parties," precluded and prohibited any "verbal statements, representations, warranties, undertakings or agreement of the parties," and permitted amendment or modification in any respect only "by written instrument signed by the parties hereto." With such explicit and uncompromising language having been accepted by Mr. Cole and Mr. Mileti, this Court would adopt for the purpose of decision herein the statement of the California court in *Banco de Brasil, supra* at 1003, made upon that court's consideration of an integration clause similar to but less descriptive than that found in the Agreement, that "It is difficult to imagine how the parties could have more clearly expressed their intent to make the written instrument a frill and complete expression of their agreement."

Having concluded that the Agreement was integrated, this Court must reject defendant's argument that evidence of the alleged collateral oral agreement is cognizable under an exception to the rule against the admissibility of parol evidence in order to "explain or supplement" the terms of the written agreement.

Under California law, it is only after determining that a contract is not integrated that parol evidence may be admitted to clarify the terms of the agreement. Even then, parol evidence is admissible for the sole purpose of determining a meaning to which disputed language in the written agreement is

"reasonably susceptible." *Pacific Gas & Electric Co. v. G.W. Thomas Drayage Co.*, (1968) 69 Cal.2d 33, 38, 69 Cal.Rptr. 561. Accord, *Banco do Brasil, supra; Gerdlund v. Electronic Dispensers International* (1987)190 Cal.App.3d 263, 272, 235 Cal.Rptr. 279.

Where, as in the present case, an alleged oral agreement between the parties directly would completely nullify the express terms of a written agreement it could not be said there were any terms of the written agreement "reasonably susceptible" to a proposed new interpretation offered by way of the parol evidence. In that regard it has been held by a California court that:

> "Testimony of intention which is contrary to a contract's expressed terms...does not give meaning to the contract; rather it seeks to substitute a different meaning. It follows under the P.G. & E. case that such evidence must be excluded." (*Gerdlund v. Electronic Dispensers International, supra*, 190 Cal.App.2d at p. 273, 235 Cal.Rptr. 279; see also, *Malmstrom v. Kaiser Aluminum & Chemical Corp., supra*, 187 Cal.App.3d at p. 316, 231 Cal.Rptr. 820; *Blumenfeld v. R.H. Macy & Co.* (1979) 92 Cal.App.3d 38, 46, 154 Cal.Rptr. 652; *American Nat. Ins. Co. v. Continental Parking Corp.* (1974) 42 Cal.App.3d 260, 264-265, 116 Cal.Rptr. 801)

Banco do Brasil, supra at 1008 and 891.

By urging this Court to admit evidence of the alleged collateral oral agreement between the parties the defendant is not asking this Court to look to that evidence in order to ascertain the intended meaning of any of the language or terms of the written contract. Clearly, as was the case in *Banco do*

Brasil, supra, while the defendant characterizes the form of the evidence as being offered to "explain or supplement" the terms of the written agreement, the substance of defendant's argument is that the alleged collateral agreement supplanted and negated the written agreement. As this Court is not inclined to honor form over substance, such evidence must be excluded.

Absent the evidence proposed by defendant, this Court must recognize the terms of the Agreement as constituting the entire agreement between the parties. Thus, the first element of a claim for breach of contract, i.e. the creation of a valid agreement between the parties, has been satisfied.

With regard to the second element, the plaintiff's adherence to the terms of the instrument, this Court finds no real question as to the salient facts.

Under the terms of the Agreement, Mr. Cole was obligated to resign immediately from his position as an officer and director of Streamers International Distributors, Inc. and to convey to Mr. Mileti his entire interest in the corporation, including 200 shares of stock and promissory notes. Evidence of record, including a letter dated August 17, 1984, from Mr. George Aronoff to Mr. Charles Scott, and an affidavit from Mr. Aronoff, demonstrates that Mr. Cole tendered his resignation as director and vice president of Streamers International Distributors, Inc. Although his signature on the Agreement reflected the anticipated transfer of Mr. Cole's interest in Streamers International Distributors, Inc. to Mr. Mileti, under paragraph 2 of the Agreement he was permitted to retain physical possession of the stock certificates and promissory notes until Mr. Mileti fulfilled his obligation to pay and perform "each and every liability and obligation of Cole, when due, pursuant to the terms of the Agreement and Note between Cole and Bank...." There is no dispute as to the failure of Mr. Mileti to satisfy the indebtedness of Mr. Cole to Equitable

Bank, Mr. Mileti's defense being premised upon the contention that he was not obligated to do so.

Nonetheless, the defendant has advanced, and now relies upon, affirmative defenses which he claims to be dispositive of the claims raised by the plaintiff.

The first, that the action is time-barred under the California statute of limitations, has already been addressed and rejected.

The defendant also raises a straw man issue pertaining to the capacity of Mr. Jeffrey Cole, as son of the plaintiff, to pursue the instant litigation on behalf of his deceased father, that defense resting upon the assertion there must have been an improper assignment of the rights under the Agreement by Mr. Joseph Cole to his son, as purportedly evidenced by the fact that his son is "the only party to bring this action or who has affidavits on file with this Court."

The total fallacy of the factual premise of the foregoing is found in the defendant's own briefing, wherein it is acknowledged that, "A suggestion of Joseph Cole's Death was filed in this matter, and Mr. Cole's widow has been substituted as Plaintiff." The record reflects that Mr. Joseph Cole died on January 8, 1995, and that on April 7, 1995 Judge Oliver granted the motion for substitution of Mrs. Marcia Cole, his widow, as plaintiff in these proceedings, under the authority of Rule 25(a)(1) of the Federal Rules of Civil Procedure.

The defendant has offered nothing to support his conclusory statements that Mr. Jeffrey Cole is (or for any reason should be considered to be) a plaintiff in these proceedings or that there was an assignment by Mr. Joseph Cole of his rights under the disputed contract.

Based upon the foregoing, this Court finds there are no genuine issues of material fact as regards the affirmative defenses of the defendant.[6]

In light of all the foregoing, this Court is of the opinion that there is no genuine issue of material fact as regards the plaintiff's entitlement to recovery based upon breach of contract by the defendant, and finds that the plaintiff is entitled to judgment as a matter of law. It follows that the defendant's motion for summary judgment must fail.

Having so held, this Court must now turn to the issue of damages, as to which plaintiff asserts entitlement to the following:

(1) the sum of $940,672.28, paid by Mr. Joseph Cole to Equitable Bank in satisfaction of a debt which should have been assumed by defendant under the terms of the Agreement;

(2) the expenses incurred by plaintiff in connection with this litigation;

(3) prejudgment interest on the aforementioned amounts.

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[6]Several additional affirmative defenses—that the instant action is barred by the doctrine of laches, that the claims are barred by the doctrines of satisfaction and release, and that "venue is not properly set in this court"—were set out in defendant's answer but not pursued in the briefing on the motions. Consequently, this Court deems those defenses as abandoned, and has not considered them herein.

Defendant, having put all his eggs in the no liability basket, did not address the issue of damages in his submissions. Although not obliged to do so, this Court will permit defendant to file a brief on that issue, to be submitted no later than February 20, 1996.

Entry of judgment will be deferred until the damage issue has been addressed by this Court.

IT IS SO ORDERED

/s David S. Perelman
DAVID S. PERELMAN
United States Magistrate Judge

DATED: February 5, 1996

AGREEMENT

THIS AGREEMENT is made this 4th day of Sept., 1984, by and between Nick J. Mileti ("Mileti") and Joseph E. Cole ("Cole").

RECITALS:

A. Streamers International Distributors, Inc., a California corporation ("Company"), was formed in June, 1983. Cole purchased common stock of Company for $200,000 (200 shares at a price of $100 per share). The shares of common stock purchased by Cole constitute one-third of the issued and outstanding common stock of Company. Cole is vice president and one of three directors of Company.

B. Company acquired the ownership of and has engaged in the distribution of a motion picture entitled "Streamers" (the "Transaction"). The Motion Picture Acquisition Agreement by which the Company acquired the ownership of "Streamers" was ratified by unanimous action of the Board of Directors of Company.

C. In furtherance of the Transaction, Cole loaned Company $300,000 on June 17, 1983, and $175,000 on August 15, 1983, and the Company executed and delivered to Cole promissory notes in these amounts with interest thereon at 12%. Such promissory notes have become due but have not been paid, and the interest thereon has not been paid.

D. The money which was used by Cole to purchase stock of the Company and to make loans to the Company as described above was borrowed by Cole from Equitable Bank of Baltimore (the "Bank"). Cole executed a loan agreement ("Agreement") and promissory note ("Note") for a maximum principal amount of $800,000 with interest to accrue thereon "at a floating and fluctuating per annum rate of interest equal at

all times to the Bank's Prime Rate of interest in effect from time to time." The Agreement authorizes Bank to pay accrued and unpaid interest on the loan from time to time by making additional advances which are thereupon added to the outstanding principal balance of the loan. The entire loan is due and payable in full upon the earlier to occur of (a) June 16, 1985, or (b) such time as the outstanding principal amount of the loan reaches $800,000.

E. Mileti has agreed to purchase Cole's stock of the Company upon the terms hereafter provided.

NOW, THEREFORE, the parties hereto agree as follows:

1. Mileti hereby absolutely and unconditionally undertakes and assumes the responsibility for the payment and performance of each and every liability and obligation of Cole, when due, pursuant to the terms of the Agreement and Note between Cole and Bank, including, but not limited to, the timely repayment of all monies borrowed pursuant to the Agreement and Note, together with all interest payments, late charges and other costs and expenses relating thereto. Cole agrees that Cole will not obtain any additional advances of principal upon the Note and therefore the only additions to principal will be for payment of interest costs or charges as they accrue. Mileti agrees that all monies owed the Bank by Cole pursuant to the Agreement and Note shall be repaid in accordance therewith not later than the close of business on June 16, 1985, and Mileti will not seek or agree to any extensions or modifications of the obligations arising out of or relating to the Agreement or Note.**

**If Mileti sells or transfers his stock in Company or the Company sells or transfers all or substantially all of its assets, Mileti shall cause the Note to be concurrently paid in full, unless the Note is assumed as provided in Paragraph 2(iii).

2. In consideration for Mileti's agreement as set forth in paragraph 1 above, Cole hereby:

(i) Grants, assigns and conveys to Mileti Cole's stock in the Company and all of the Cole's right, title and interest therein.

(ii) Grants, assigns and conveys to Mileti, absolutely and unconditionally, all right, title and interest of Cole to the indebtedness of Company in the amount of $475,000 and the interest thereon, as evidenced by two promissory notes of Company.

(iii) Cole will continue to hold the stock certificates and promissory notes as pledged security for the due performance of Mileti's obligations under Paragraph 1, which obligations will be deemed performed if they are assumed by a major/U.S. motion picture production/distribution company. Upon performance of such obligations, Cole will deliver to Mileti the stock certificate evidencing such stock, together with an assignment thereof to Mileti executed by Cole, and said promissory notes.

3. Mileti agrees and undertakes to indemnify Cole and hold Cole harmless against all expenses (including attorneys' fees), judgments, costs, losses, damages and liabilities arising out of Cole's borrowings from Bank, Cole's purchase of stock in Company, Cole's loans to Company, or any liability of Cole as a director, shareholder and/or officer of Company arising out of Company's action or inaction. Concurrently herewith, Cole is delivering to Mileti his written resignation as vice president and director of Company.

4. The rights under this agreement shall not be assignable or the duties delegable by either party without the consent of the other party hereto having been obtained thereto.

5. All covenants and agreements of the parties contained herein shall be binding upon and inure to the benefit of Cole and Mileti and their respective heirs, estates and personal representatives.

6. No remedy conferred by any of the provisions of this agreement is intended to be exclusive of any other remedy, and each and every remedy shall be cumulative and shall be in addition to every remedy given hereunder or now or hereafter existing, at law or in equity, by statute or otherwise. The election of one or more remedies by either party shall not constitute a waiver by such party of the right to pursue other available remedies.

7. This agreement constitutes the entire agreement between the parties. There are not and shall not be any verbal statements, representations, warranties, undertakings or agreements between the parties, and this agreement may not be amended or modified in any respect except by written instrument signed by the parties hereto.

8. This agreement shall be governed and construed in accordance with the laws of the State of California.

IN WITNESS WHEREOF, the parties have duly executed this agreement on the date first above written.

/s Joseph E. Cole
JOSEPH E. COLE

/s Nick J. Mileti
NICK J. MILETI

RESTATEMENT OF THE LAW

SECOND

CONFLICT OF LAWS 2D

Revisions

of Portions of the 1971 Text of Restatement of the Law, Second, Conflict of Laws 2d

As Adopted and Promulgated

By

THE AMERICAN LAW INSTITUTE AT CHICAGO, ILLINOIS

May 19, 1988

Volume 1

ST. PAUL, MINN.

AMERICAN LAW INSTITUTE PUBLISHERS

1989

§ 142. Statute of Limitations

Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:

(1) The forum will apply its own statute of limitations barring the claim.

(2) The forum will apply its own statute of limitations permitting the claim unless:

(a) maintenance of the claim would serve no substantial interest of the forum; and

(b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Comment:

. . . .

g. *Forum has the longer statute.* As stated in Comment *e*, the earlier view was that statutes of limitations should usually be characterized as procedural. Accordingly, a claim would be maintained, subject to one exception, if it was not barred by the statute of limitations of the forum even though it would be barred by the statute of limitations of the alternative

forum. This exception, as stated in Comment *e*, covered the relatively rare situation where the forum would characterize as substantive a statute of the alternative forum on the ground that the statute was deemed to bar the right and not merely the remedy. In such circumstances, the forum would not entertain a claim that was barred by the statute of limitations of the latter state. It was for the forum court to determine whether a foreign statute of limitations barred the right and not merely the remedy. The almost invariable prerequisite was that the liability sought to be enforced was created by statute. Once this requirement had been met, the usual test was whether, in the opinion of the forum, the limitation provision was directed to the right "so specifically as to warrant saying that it qualified the right." Davis v. Mills, 194 U.S. 451, 454 (1904). Other tests were at times employed, such as whether the statute of limitations had attributes in the state of its enactment which the forum would characterize as substantive; for example, that the defense could be raised even though not pleaded or that the obligation could not be revived after the statutory period had elapsed. Situations where a statute of limitations was held to bar the right were most commonly those where the statute created a right of action and also contained a provision limiting the time in which a suit to enforce the right of action could be brought. Wrongful death statutes were typically statutes of this sort.

The view that statutes of limitations should ordinarily be characterized as procedural has been abandoned in many recent decisions. Under these decisions, the question whether a statute bars the right and not merely the remedy has lost its significance. The forum will no longer entertain a claim with which it has otherwise no contact simply because the claim is not barred by its own statute of limitations. Entertainment of the claim under such circumstances would disserve the forum's general policy against the prosecution of stale claims and would not serve any other forum interest. Likewise, entertainment of the claim would frustrate the policy of all other states having a

substantial interest in the case and under whose statute of limitations the claim would be barred.

The view that the forum would entertain a claim that was not barred by its own statute of limitations, even though the forum had no other contact with the case, could lead on occasion to egregious examples of forum shopping. See, e.g., Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Cowan v. Ford Motor Co., 694 F.2d 104 (5th Cir.1982); 713 F.2d 100 (5th Cir.1983); 719 F.2d 785 (5th Cir.1983).

The forum will entertain a claim that is not barred by its statute of limitations, but is barred by the statute of limitations of one or more other states, in situations where allowing the claim would advance a substantial forum interest and would not seriously impinge upon the interests of other states. This will be so when the state of the forum is the one of most significant relationship to other important issues in the case. For example, when domiciliaries of state X enter into a contract in state Y which provides that it shall be governed by X law, the rights and duties of the parties under the contract will usually be governed by X law under the rule of § 187, and the X courts will entertain an action for breach of the contract if the action is not barred by the X statute of limitations, even though it would be barred by the statute of limitations of Y. There are also situations where the forum will entertain an action that is not barred by its statute of limitations even though the forum is not the state of most significant relationship to other issues. Suppose, for example, that two domiciliaries of state X are involved in an automobile accident in state Y. In this case, the local law of state Y may govern substantive issues in the case under the rule stated in § 146. Yet it would be appropriate for an X court to entertain the claim if it was not barred by the X statute of limitations even though it would be barred by the Y statute. Entertainment of the claim under such circumstances would not violate any Y policy and might further the policy of X. The same would be true if the accident in state Y had

involved domiciliaries of states X and Z and, although the statute of limitations had run in Y, it had not done so in either X or Z. In such a case, it would be appropriate for a court of either X or Z to entertain the claim.

Decision becomes difficult in situations where, although the forum is not the state of most significant relationship to important issues in the case, some forum interest would be served by entertainment of the claim, but this would be at the expense of the interests of another state which has a closer connection with the case and under whose statute of limitations the claim would be barred. One such situation is where the domicil of the plaintiff is in the state of the forum and that of the defendant is in the other state with the most significant relationship to important issues in the case. In such a situation, the forum should entertain the claim only in extreme and unusual circumstances.

. . . .

Speaking generally, a claim that is not barred by the local statute of limitations should not be entertained if no interest of the forum state would be served by entertaining the claim and the claim would be barred by the statute of limitations of the alternative forum. Entertainment of the claim under such circumstances would add to the burden on the local courts and bring no countervailing advantage. This will be so even in situations where entertainment of the claim would not be adverse to the interests of the other states.